Legal Punishment of Immorality: Once more into the breach

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Abstract: Gerald Dworkin's overlooked defense of legal moralism attempts to undermine the traditional liberal case for a principled distinction between behavior that is immoral and criminal and behavior that is immoral but not criminal. According to Dworkin, his argument for legal moralism "depends upon a plausible idea of what making moral judgments involves." The idea Dworkin has in mind here is a metaethical principle that many have connected to morality/reasons internalism. I agree with Dworkin that this is a plausible principle, but I argue that some of the best reasons for accepting it actually work against his enforcement thesis. I propose a principled distinction between the immoral-and-criminal and the immoral-but-not-criminal, and argue that a principle at least very much like it must be correct if the metaethical principle Dworkin avows is correct.

legal moralism; liberal neutrality; public justification; Hart-Devlin debate; Gerald Dworkin

The recent fiftieth anniversary of the publication of H.L.A. Hart's *Law, Liberty and Morality* (1963) finds moral, political and legal philosophers once again considering Hart's influence on the legal moralism debate.[1] The broad outline of the history of the debate is familiar: Hart was attempting to undermine Patrick Devlin's criticisms of the relatively liberal-minded *Report of the Committee on Homosexual Offenses and Prostitution* (1957), more commonly referred to as the *Wolfenden Report*. Devlin published these reactions, along with responses to Hart, in *The Enforcement of Morals* (1965). The point at issue in this Hart-Devlin debate is the legitimacy of utilizing criminal sanctions to enforce morality *as such*. According to Devlin, it is legitimate at least in principle to do so in certain circumstances; Hart argued that this is an illegitimate use of the state's coercive power. He argued, further, that the appropriate test for whether using this power is permissible is John Stuart Mill's

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[1] See, for example, the special Symposium issue on Law, Liberty and Morality: Fifty Years On of *Criminal Law and Philosophy*.

harm principle, modified in various ways. Hart was quickly joined by nigh all of liberal political philosophy; indeed, Hart has been widely regarded among political philosophers to win this debate *decisively*. Joel Feinberg, for example, finds the quality of Devlin's arguments "uneven" and his attempts to come to grips with Hart's criticisms "feeble and perfunctory" (1987b, p. 249).

Until recently, Gerald Dworkin has been a relatively lonely, if not lone, voice of dissent to this otherwise unified liberal front against legal moralism.[2] He advances two strategies of argument concerning the permissibility of legal moralism. The first strategy attempts to undermine arguments that would rule out mere immorality as legitimate grounds for legal coercion.[3] Dworkin is skeptical of more traditional liberal arguments from neutrality against legal moralism. His specific target is Feinberg. My first two sections below discuss this argumentative strategy of Dworkin's. In section I below, I discuss the sense in which Dworkin's conclusions in his reconsideration of the Hart-Devlin debate count as liberal. In section II, I respond to his attempts to rebut and undermine more traditional liberal views about the legitimacy of the state using coercion to root out immorality. Objections to the liberal principle of political neutrality are common, as are contemporary defenses of neutrality. I defend a fairly generic version of liberal neutrality in response to Dworkin's criticisms.

I turn to Dworkin's second strategy of argument in section III. This is a positive strategy, demonstrating to his mind why the "mere immorality of an action brings it within the legitimate sphere of the criminal law" (1999, p. 946). Unlike Dworkin's first strategy, I do not think that

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[2] Liberal perfectionists sometimes argue for the legitimacy of the state using legal instruments to promote certain values. Joseph Raz's principle of autonomy, for example, "permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones" (Raz 1986, p. 417). Yet Raz disavows legal moralism in favor of a (peculiar sort of) harm principle. Direct support of Dworkin's opposition to Hart and Feinberg is more recent. See, especially, Richard Arneson who writes, "My views on the enforcement of morals as such (legal moralism) owe a lot to Dworkin's insights" (2013, p. 441, n. 12).

[3] He subjects the views of Ronald Dworkin (in Dworkin 1990) and Joel Feinberg (in Dworkin 1999) to close scrutiny.

traditional liberal political philosophers have adequately dealt with this argument. According to Dworkin, the argument "depends upon a plausible idea of what making moral judgments involves" (ibid., p. 942). The idea he has in mind here is a metaethical principle that many have connected to morality/reasons internalism. Morality/reasons internalism posits an internal, conceptual relationship between moral obligation and reasons for acting. The metaethical principle Dworkin relies on posits an internal, conceptual relationship between moral wrongness and punishability.[4] I agree with Dworkin that this is a very plausible principle, but I will argue that some of the best reasons for accepting it actually work against his enforcement thesis. Dworkin asserts in the title of his paper, "Devlin was right." He was right, Dworkin thinks, to deny any principled distinction between actions that are immoral and legitimately criminal and those that are immoral but not legitimately criminal. I will propose a principled distinction between the two and argue that a principle at least very much like it must be correct if the metaethical principle Dworkin avows is correct.

I. Dworkin's liberalism

Dworkin approaches the Hart-Devlin debate by attempting to separate two questions. The first question has to do with the substantive matter of whether the state should interfere with certain activities, "e.g., homosexual sex, on the grounds that it considers the conduct immoral" (1999, p. 928). The second question concerns the in-principle legitimacy of the state doing so. Dworkin says,

> On most issues concerning specific laws, I side with Hart, against Devlin, in believing that the conduct in question should not be criminalized. I side with Devlin, however, in believing that there is no principled line following the

[4] Or, more generally, between moral obligation and accountability. Stephen Darwall presents morality/reasons internalism in Darwall 1997 (p. 306). He connects this view to the metaethical principle Dworkin invokes in Darwall 2006a (pp. 276-277), Darwall 2006b (pp. 26-27) and Darwall 2007 (pp. 290-292). Others who make similar arguments include Skorupski 1999 (pp. 42-43) and Portmore 2011 (pp. 43-44).

> contours of the distinction between immoral and harmful conduct such that only grounds referring to the latter may be invoked to justify criminalization (ibid.).

Dworkin agrees with Devlin that there is no principled way to rule out as illegitimate the state restricting activity that is 'merely immoral'. Dworkin denies that the attempts of traditional liberals to carve out this distinction have been successful. Part of the reason for this is that harmful activity is, after all, immoral. Traditional liberals acknowledge this but typically argue that the immorality of harmful conduct is not what renders the laws against it legitimate. The fact that it is harmful, and not something the person has a right to do, does. In turn, Dworkin acknowledges that the liberal argument is motivated by the unwillingness among traditional liberals to enforce "various ideals, such as ideals of virtue and character, certain ideals of fairness or fittingness, and ideals of sexual conduct" (ibid., p. 930). These liberals require state neutrality concerning such ideals. To be more precise, traditional liberals require state neutrality concerning persons. The state should be neutral concerning persons because of a moral commitment to respecting the equal freedom and moral status of all and this commitment places moral limits on which ideals a liberal state can legitimately promote or protect through coercive means (Gaus 2009a, p. 83). But Dworkin will argue that the principle traditional liberals typically invoke, that of protecting people from certain kinds of harm, is unable to support their favored division between those activities that are, and those that are not, the state's business. I take up these arguments in section II.

But if Dworkin is not liberal in the traditional sense of defending a principled harm-based or neutral dividing line between immorality and criminality, what sort of liberal is he? In the context of the Hart-Devlin debate, it is obvious that he is the sort of liberal who denies homosexual sex should be criminalized. Not because homosexual sex is left untouched by the harm principle or because

criminalizing it would violate state neutrality; rather, "the reason such conduct ought not be criminalized is that there is nothing immoral in it."[5]

This claim suggests an interpretation of the legal moralism debate where the central issue is about which values should win out in the case of conflict. Either the community's values will, which at the time Devlin was writing precluded homosexual sex, or certain liberal values will, like autonomy, privacy, equality or tolerance. This is also one way of marking the distinction between "positive" and "critical" morality. A conservative attitude towards homosexuality had greater currency among that particular community at that particular time, but the appropriate critical standpoint calls for a more liberal attitude towards homosexuality, according to which "there is nothing immoral in it." Dworkin clarifies his position in the legal moralism debate as follows:

> It is important to note that almost all of the Hart-Devlin debate concerned the enforcement of "positive" morality, i.e., the currently accepted moral views of the society. I am exclusively concerned with the enforcement of "critical" morality, i.e., the set of moral principles that one believes are the correct (best justified, true) views concerning moral matters for the society in question (ibid., p. 928, n. 8).

In that case, Dworkin is a liberal in the sense that he recommends standing up to the community's impositions because traditional, conservative moralists are mistaken in believing that homosexuality is wrong. We should rather promote the moral autonomy of homosexual citizens by leaving them alone to pursue the kinds of relationships that are meaningful to them. This is precisely what has happened in this particular debate about social policy over the past fifty years. The positive morality in Western-oriented societies has shifted in this more liberal direction to more closely line up with Dworkin's understanding of the critical morality: laws against homosexual sex are morally backward.

[5] Dworkin 1999, p. 946. If debates about the morality of homosexual sex are passé, then substitute some other more controversial contemporary issue.

Dworkin, then, is a liberal in the sense that he has moral commitments that deliver the conclusion that the state should not coercively impose some traditional, religiously oriented (positive) point of view. But he is a legal moralist in the sense that the state may legitimately (and presumably should) enforce policies grounded in the (critical) principles that have the best claim on moral truth. This does not mean that Dworkin would defend the criminalization of anything that is (truly!) morally wrong. He might not defend criminalizing something morally wrong if, for example, doing so somehow makes things worse. Perhaps legal enforcement would be ineffective or wasteful or have unintended negative consequences. But otherwise Dworkin should generally say that it would be legitimate for the state to criminalize behavior that the appropriate critical moral principle prohibits. Devlin was right, according to Dworkin, because there is no principled way to distinguish between conduct that is *immoral-and-criminal* and *immoral-but-not-criminal*.

II. Dworkin against liberal non-enforcement

Dworkin's liberalism departs from traditional liberal political thought that focuses in different ways on limiting the legal imposition of moral values. The most often cited example of this tradition is J.S. Mill's "one very simple principle" which limits the legitimate exercise of power over others to instances that "prevent harm to others."[6] Joel Feinberg is standing firmly within this tradition of liberalism when he distinguishes between harmless and harmful wrongdoing. Only the latter should be threatened with legal interference. For Feinberg, wrongdoing is harmless when the conduct does not set back the interests of anyone or, if it does, not in a way that violates anyone's rights or provides them with a basis for a complaint (Feinberg 1988a, p. xxix). Only actions that violate this harm principle are legitimate candidates for criminalization. As he explains,

[6] Mill (1859) 2004, p. 10. Though just "one very simple principle," interpretations of it vary. Daniel Jacobsen canvasses many of them and presents a novel understanding of Mill's "Doctrine of Liberty" in Jacobsen 2000.

> The harm principle mediated by the *Volenti* maxim protects personal autonomy and the moral value of "respect for persons" that is associated with it …. But there are other moral principles, other normative judgments, other ideals, other values – some well-founded, some not – that the harm principle does not enforce, since its aim is only to respect personal autonomy and protect human rights, not to vindicate correct evaluative judgments of any and all kinds (ibid., p. 12).

But, Dworkin asks, why should the law "be limited to the protection of [Feinberg's] particular values, namely personal autonomy and respect for persons…why may the law not protect [other] ideals?" (Dworkin 1999, p. 939). The answer from Feinberg that Dworkin goes on to consider is that those other ideals are not typically weighty "enough to offset the presumptive case for liberty" (Feinberg 1988a, p. 5). This liberty presumption is the idea that "liberty should be the norm; coercion always needs some special justification" (Feinberg 1987a, p. 9).

So we could identify a variety of ideals and values (some well-founded, some not) and consider their use as bases for a list of enforcement theses:

E1: enforce the society's positive morality.

E2: enforce the critical (the correct, best justified, true) morality.

Perhaps E1 looks a lot like

E3: enforce traditional religious morality.

Or, perhaps E2 will entail E1, E3 or

E4: enforce utilitarianism; or

E5: enforce natural rights libertarianism.

We can understand Feinberg, however, to be proposing a different enforcement thesis:

E6: enforce the protection of personal autonomy and respect for persons *via* the harm principle.

According to Feinberg, E6 justifies the use of state coercion; any moralistic statute based on a different enforcement thesis does not. A presumption in favor of liberty, or against coercion,

amounts to an asymmetric justificatory standard where the party advancing a coercive rule undertakes a burden to account for the legitimacy of the rule. Mill provides an early statement of the presumption as a companion to his harm principle to help guide its application: "the burden of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition…. The a priori assumption is in favour of freedom…" (Mill 1963, p. 262). So, for Mill, a necessary condition for meeting the presumption, and justifying the restriction, is harm prevention. The harm principle shows how to justify coercion. Feinberg's argument against legal moralism, as Dworkin summarizes it, is the idea that "given the importance of personal liberty, if we are unable to justify a restriction of liberty by pointing to someone who can complain, we cannot restrict liberty" (1999, p. 941). Any of a variety of other moralistic considerations, though not ruled out as irrelevant, will fail to justify restricting liberty. So,

1. "Liberty should be the norm; coercion always needs some special justification."
2. Enforcing protections of personal autonomy and respect for persons through the harm principle mediated by the *Volenti* maxim justifies the use of coercion.
3. Other moral principles, ideals and values, even well-founded ones, fail to overcome the liberal presumption against coercion.
4. Therefore, state coercive policies based on them are illegitimate.

Dworkin immediately objects to this argument:

> Various ideals, though, are at least as important to us as some of our minor grievances. If it is inappropriate to view children as commodities, if surrogacy implicates this attitude, and if it is worth paying the costs of preventing some couples from having children in this way, the burden of proof that must be overcome before restricting liberty seems as easily surmounted as it would be in the case of many harms (ibid.).

He does not expand a great deal on this objection. One idea seems to be that, given premise 2, the state could legitimately restrain many harms that plausibly count as mere minor grievances. Imagine I make a minor, but real, nuisance of myself to others by following them around throughout the day and, every twenty minutes or so, lightly flicking their ears. These people would have a right to

complain and, at some point, have a police officer arrest me. But if it is legitimate to use coercion to stop me from lightly flicking people's ears, then *a fortiori*, it should be legitimate to use state coercion to promote a variety of ideals that are at least as weighty and significant, some vastly more so. If this is right, then Feinberg's restriction seems arbitrary or under-motivated, question begging or conclusory.

Perhaps Feinberg's justificatory test should be modified. Presumably, Feinberg proposes the harm principle in response to liberalism's requirement that states be neutral with respect to its citizens. "Liberalism," he once wrote, "by its very nature, must be neutral with respect to the particular ends that individuals pursue" (1988b, p. 38). Harm-based reasons for coercive policies are plausibly neutral in the relevant sense, but perhaps certain kinds of values are appropriately neutral, as well, and the harm principle really is too restrictive, as Dworkin suggests. He had briefly introduced the idea, before turning to Feinberg's arguments, that questions about liberal legitimacy are sometimes tracked by adopting "some kind of 'justifiable to' restriction…":

> It could be a Rawlsian "only principles that all citizens may reasonably be expected to endorse," or a Scanlonian "only principles which are not reasonably rejectable," or a Larmorian "principles…must be ones which are justifiable to everyone whom they are to bind." Whichever of these one adopts, the idea is to avoid, if possible, appealing to any controversial conception of what is intrinsically valuable (Dworkin 1999, p. 936).

Dworkin does not say more about this alternative justificatory test in the context of the Hart-Devlin debate, but it is certainly relevant.[7] Public reason liberals, like John Rawls, Thomas Scanlon, Charles Larmore and, more recently, Gerald Gaus, have presented extensive defenses of such "justifiable to" principles to account for the legitimacy of coercion.[8] Roughly, the proposal is that coercion has to be

[7] Dworkin has attempted to raise problems for the version Rawls defended in *Theory of Justice* in Dworkin 1974.

[8] See Rawls 2005, Larmore 1996, Scanlon 1998 and Gaus 2011.

justified in terms of reasons that are public in the requisite sense.[9] A modified version of Feinberg's argument that substitutes in this kind of justificatory test would look something like this:

1. "Liberty should be the norm; coercion always needs some special justification."
2*. Only publicly justified principles, ideals and values justify the use of coercion.
3. Other moral principles, ideals and values, even well-founded ones, fail to overcome the liberal presumption against coercion.
4. Therefore, state coercive policies based on them are illegitimate.

Accounts of public justification differ in all sorts of ways, but, speaking generically, the requirement prevents considerations that do not make sense to members of the public, ones they cannot reasonably go along with, from figuring into a justification for coercing them.

How does this reformulation address Dworkin's initial objection to Feinberg's version of the four-step argument? Dworkin was concerned that Feinberg's principle in 2 does not allow us to protect or promote various ideals that we hold dear. Similarly here, a specification of the public justification principle in 2* will mean that we may not be permitted to coercively enforce certain ideals that are weighty and significant to us, yet rules to prevent mere minor grievances may pass the justificatory test. For example, on the Rawlsian view this is because some reasons for coercion will count as justifiers and others will not. Public justification is a justification that admits reasons that all can reasonably accept. The test *excludes* reasons that are not reasonably acceptable to all from being able to do justificatory work, preventing these reasons from being a legitimate basis for the law. The more recent Gausian view is more permissive in that any of a citizen's reasons may play a part in justifying laws to her. That is, laws are justified to each citizen on the basis of their complete set of

[9] I have been presenting Mill's harm principle as an early version of a public justification test for the legitimacy of legal coercion, which focused exclusively on harm-based reasons. Since some reasons that might plausibly be public in the requisite sense are not really harm-based, and some harm-based reasons might not really be public in the requisite sense, we should introduce the modification that follows. However, an anonymous referee suggests that Mill's harm principle is more a substantive constraint on the law's content rather than a test of public reasoning. I don't object to this interpretation of Mill, but since it is no less susceptible to Dworkin's objection, we should introduce the modification that follows.

beliefs, values and commitments, so long as these are intelligible. Any intelligible reason can feature within the overall public justification of a law. However, people whose beliefs, values and commitments provide them with an intelligible rationale for rejecting a law have a defeater for it and it would be illegitimate to subject them to it. On either specification of the public justification principle, ideals that perhaps many citizens find extremely valuable may not be legitimately enforceable.

For public reason liberals, though, this is a feature of the account rather than a bug because the principle will tend to prevent the state from enforcing sectarian laws. Gaus gives a general characterization of illiberal sectarianism where

> β is an illiberal sectarian doctrine in population P if (1) β is held only by S, a proper subset of P, (2), the members of S justify moral and political regulations R for the entire P population (3) by appeal to β and (4) only β could justify R (2012, p. 8).

Liberals argue that it is illegitimate to enforce restrictions on others by appeal to a controversial sectarian doctrine, one which they have sufficient reason to reject, in cases where no other doctrines could justify those rules. This standard of legitimacy answers to the liberal commitment to respecting the free and equal moral status of persons.

Consider a series of further questions about the reformulated liberal argument against legal moralism. First, premise 1 is based on the value of agency. Why should it be legitimate for public reason liberals, who purport to require neutrality about substantive values, to rely on it? One answer is that liberal neutrality does not rule out relying on substantive values. It would be closer to the truth to say that it rules out relying on substantive values as a basis for coercive policies, but the liberal presumption is not a coercive policy. Actually, however, liberal neutrality does not even rule out relying on substantive values to ground coercive policies. It rules out relying on substantive values to ground coercive policies when they fail to pass the test of public justification. This is why

moralistic considerations typically fail the test of public justification. These are coercive policies that derive support only from moral values and ideals that are distinctive to some group or other.[10] So the fact that a great many moralistic considerations fail the justificatory test is simply a feature of value pluralism among members of the public.

An additional question, then, is why should coercive policies that protect agency pass that test? The answer relies on a distinction between minimal agency and robust autonomy. Both concern some kind of independence or self-direction, but I doubt that too many rules protecting the more robust sense of autonomy would pass the test of public justification. For example, members of some small, insular, conservative community could reasonably reject a rule that required their children to go to a school that teaches these children to question or reject the authority of their community. The state may want to do that to promote certain aspects of these children's autonomy, but doing so may not be justified to the people affected by the coercion in terms they have reason to go along with. The group may see 'jet-fueled' autonomy as destructive of their tradition-oriented community. But even that community must acknowledge the value of minimal agency. Their own argument against the legitimacy of the coercive educational policy when applied to them actually relies on the value of agency since, in demanding to be exempt from the policy, they are asserting the right to be left alone to organize their lives in line with certain values they identify with and prize. This commitment to minimal agency is, likewise, the reason it would be illegitimate for the group to coercively prevent one of their members from leaving the community and why a state could legitimately impose a coercive policy protecting people's right of exit from it. From a first-person point of view everyone is committed to claiming noninterference for his or her actions. We all presume the legitimacy of this, as premise 1 of the argument asserts. This claim derives from the

[10] Alternatively, moralistic considerations that are considerations (or reasons) distinctive to some group will fail the test of public justification.

generic features of human agency as such, e.g., deliberation and choice. So, everyone has the same grounds for claiming this presumption. Everyone values their own agency, wants others to respect it, and so is plausibly committed to acknowledging and respecting the agency of others.

There are ongoing debates about public reason liberalism, which are obviously important for a contemporary understanding of the debate about legal moralism. In a recent essay revisiting the enforcement thesis, Richard Arneson considered, and summarily rejected, this public justification test or "liberal legitimacy norm" because

> In a nutshell, [it] is too liberal. Enforcing controversial conceptions… is morally acceptable just in case one can identify and put state power behind the conceptions best supported by the best critical morality available in our time. Reasonable people make mistakes. Reasonable people may understandably reject the best views. That the views on morality currently being enforced are such that reasonable people could reject them is compatible with their being the correct views, which ought to be enforced (2013, p. 454).

Presumably, "too liberal" here means something like "unduly restrictive" about what we can legitimately punish and so not a good way to distinguish between conduct that is *immoral-and-criminal* and *immoral-but-not-criminal*. The reason Arneson cites – that the correct or best justified critical moral view obviously ought to be enforced – is quite reminiscent of Dworkin's positive argument.[11] I turn to this argument now.

III. Dworkin's internalism

The matter about which Dworkin says "Devlin was right" is the impossibility of drawing a principled, rather than merely pragmatic, line designating which matters of morality the state appropriately regulates by means of the criminal law. Notice that the question is not *whether* the state appropriately regulates matters of morality by means of the criminal law, but *which* matters of

[11] Arneson elaborates in Arneson 2010 and Arneson 2014.

morality the state appropriately regulates. This must be the right question because, even though the debate is typically framed in terms of being for or against legal moralism, if those on Hart's side advance some version of a harm principle, then certainly this is because harming people in various sorts of ways is morally wrong. But any plausible critical moral principle will deliver a lot more than just the wrongness of causing harm. Some of the prescriptions the best account of the critical morality delivers will be imprudent to enforce with legal instruments, but whatever it delivers, according to Dworkin, can in principle be appropriately legally enforced. Thus, he deflates the putative distinction between *immoral-and-criminal* and *immoral-but-not-criminal*.

I responded to this in the previous section by offering a modified liberal argument that relies on some version of a public justification principle. It aims to explain a principled restriction on the enforcement of morality by appealing to a liberal argument against the coercive imposition of sectarian moral ideals, i.e., ones that are not publicly justified. I admit that this principle is controversial in the sense that not everyone accepts the public justification principle, but it would be to misunderstand the view to suggest that relying on the principle amounts to imposing a sectarian moral ideal.

Yet Dworkin presents a further argument that aims to show that no liberal argument – not Mill's or Feinberg's or anyone else's – is likely to succeed in establishing a principled line. This argument "depends upon a plausible idea of what making moral judgments involves" and is derived from Mill, of all people, "the patron saint of liberalism" (Dworkin 1999, pp. 942, 943). I quote Mill more fully than Dworkin does:

> We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience…. It is a part of the notion of duty in every one of its forms, that a person may rightfully be compelled to fulfill it. Duty is a thing which may be *exacted* from a person, as one exacts a debt. Unless we think that it may be exacted from him, we do not call it his duty. Reasons of prudence, or

> the interest of other people, may militate against actually exacting it; but the person himself, it is clearly understood, would not be entitled to complain (Mill [1861] 1979, pp. 47-48).

This passage presents an understanding of two moral concepts that ties them to two appropriateness judgments. First, Mill asserts that moral wrongness is conceptually tied to the appropriateness of punishment (or blame or guilt). Second, he asserts that moral duty or obligation is tied to the appropriateness of making a kind of demand (requiring someone to do something). Dworkin endorses these claims and takes the lesson of the passage to be that "if an action is wrong, that provides a reason – perhaps conclusive, perhaps not – for not doing it. It also provides a reason – perhaps conclusive, perhaps not – for discouraging the performance of such actions" (1999, p. 943). This is a pretty straightforward argument, then:

1. Making a moral judgment that something is wrong involves the idea that it not be done, that there are reasons for people not to do it and that people who do it are criticizable and punishable ("if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience").
2. Therefore, the mere fact that an action is immoral can bring it within the legitimate sphere of the criminal law.

"Wrong" *just means* that a demand is, in some way or other, "legitimately enforceable." I agree that this idea in 1 is, as Dworkin claims, a plausible idea. I accept it. The question, though, is whether we should understand it as support for legal moralism, despite Mill's explicit rejection of the legitimacy of legislation grounded in claims about the inherent wrongness an action in *On Liberty* where a person's "own good, either physical *or moral*, is not a sufficient warrant" for interfering with or punishing the actor.[12] If we should, it would not be the first time someone has worried about possible inconsistencies between *On Liberty* and *Utilitarianism*, but I do not think we should understand Mill's claims about the semantics of moral terms as support for legal moralism.

[12] Mill [1859] 2004, p. 10. Emphasis added.

Mill posits a conceptual link between moral wrongness and punishment and between moral duty and demand in the same passage. Both are parts of a full picture of what is supposed to be normatively distinctive or special about moral "oughts" as compared to merely pragmatic, expedient or conventional ones. What Stephen Darwall calls morality/reasons internalism provides a more basic first pass at what is supposed to be distinctive to morality: "if *S* morally ought to do *A*, then necessarily there is reason for *S* to do *A* consisting either in the fact that *S* morally ought so to act, or in considerations that ground that fact" (1997, p. 306). Morality/reasons internalism is most often presented as a conceptual claim about the semantics of moral statements. It is reflected in the idea that the claims of morality are essentially normative. Moral claims are claims about what people have reason to do. They employ terms that are evaluative, prescriptive or action guiding and so they have what David Copp calls generic normativity (2007, p. 250). Of course, many non-moral claims, like judgments of etiquette, aesthetics and prudence, have this feature, as well, which Philippa Foot has attempted to exploit in order to undermine morality/reasons internalism (Foot 1972). But its defenders are usually committed to something stronger than mere generic normativity. Morality is supposed to be distinctive from etiquette, aesthetics and prudence in that the claims of morality are (something like) categorical, or authoritative. A distinctively moral directive for *S* to do *A* is supposed to have what Richard Joyce calls "practical clout" or "*oomph*" (2005, p. 62). Accordingly, someone who asked 'but what reason do I have to care about what I morally ought to do?' is making some kind of mistake. A genuinely moral directive adverts to reasons or considerations that cannot be legitimately shrugged off in this facile way.

This view about the internal connection between the requirements of practical reason and the requirements of morality is actually a species of moral rationalism. Moral rationalists usually say that the requirements of morality are practically *decisive*, but I shall only invoke the notion that claims of morality purport to provide significantly weighty reasons for action, ones that have greater

deliberative force about what to do than, say, mere expediency or etiquette. This version of the thesis avoids, on the one hand, the suggestion that morality has absolute weight in practical deliberations, and, on the other hand, the suggestion that morality is a system of mere hypothetical imperatives. Even with such qualifications, though, moral rationalism is controversial. How do moral obligations get this special authoritative reason-giving force? "In virtue of what," *S* might say, "do I have this kind of very weighty reason to do *A*?"

Darwall answers this question by invoking the conceptual link in Mill's passage between moral wrongness and punishability or accountability. He writes, "To judge an action wrong is to see the agent as rightly subject, lacking adequate excuse, to some sanction or other form of other- or self-directed second-personal reactive attitude like blame or guilt, that might constitute holding her morally responsible" (2007, p. 290). But when an agent thinks that blame is appropriate, Darwall continues, the agent is committed "to thinking there was a good reason for the person not to have done what he did (normatively). It would simply be incoherent to judge someone blameworthy while acknowledging there really was no reason whatsoever for him not to have acted as he did" (ibid., p. 292). So, according to Darwall, the role that moral demands have in social practices of blaming, punishing or otherwise holding others accountable can only work if their reason-giving force is authoritative. Douglas Portmore makes an argument in this vein even more explicitly:

1. If S is morally required to perform x, then S would be blameworthy for freely and knowledgeably performing ¬x.
2. S would be blameworthy for freely and knowledgeably φ-ing only if S does not have sufficient reason to φ.
3. So, if S is morally required to perform x, then S does not have sufficient reason to perform ¬x.
4. If S does not have sufficient reason to perform ¬x, then S has decisive reason to perform x.
5. Therefore, if S is morally required to perform x, then S has decisive reason to perform x (2011, pp. 43-44).

A person who shrugs off a genuine moral demand makes herself an appropriate target for blame and punishment, and targeting her for blame and punishment only makes sense if she had sufficient reason (of the relevant strength) to act differently than she did.

Insofar as Dworkin endorses the passage in Mill, he should have little problem with the foregoing. After all, it was simply an explication of the conceptual connections Mill was asserting in the quoted passage. However, I think the explication undermines the way that Dworkin intended to enlist Mill in support of legal moralism. The reason is that even if moral demands present themselves as having genuinely authoritative normativity, we should not assume that all (or even most) demands so presented actually have this distinctively moral status. Obviously, not all demands are genuinely authoritative. Some (or many) of these demands are rather authoritarian impositions with no genuine normative force. When is a given claim justified?

Here, Dworkin is not much help. He does say, recall, that his concern in the legal moralism debate is "the enforcement of 'critical' morality, i.e., the set of moral principles that one *believes* are the correct (best justified, true) views concerning moral matters for the society in question."[13] But he does not tell us what these views are. Obviously, I do not mean simply to fault Dworkin for neglecting to provide the best normative ethical theory, which will ground genuinely authoritative moral judgments. The problem is rather that he gives the impression that merely *believing* that a set of principles is correct, best justified or true is sufficient for grounding a rule requiring some activity and bringing it within the legitimate sphere of the criminal law and associated punishment norms. Dworkin's position is not, I trust, that the mere fact that some principle is accepted is sufficient to legitimize the enforcement of the principle – that would be too close to Devlin's view about the positive morality. But, on Dworkin's view about the critical morality, any arguments that are aimed at *the truth*, or the correctness of a moral principle, are legitimately enforceable in principle.

[13] Dworkin 1999, p. 928, n. 8. Emphasis added.

This is problematic because if simply having an argument, one you arrive at in good faith, that something is morally right or wrong can make something part of the critical morality, then it is hard to see how the distinction between the positive morality and the critical morality does very much normative work. After all, nearly everyone takes his or her moral views to aim at something like truth or correctness. Most people believe that the moral views they hold are the ones best justified and true. If, for example, the views of same-sex marriage advocates, held sincerely and arrived at in good faith, make it legitimate to enact marriage equality laws, then the views of marriage traditionalists, held sincerely and arrived at in good faith, make it legitimate to prevent same-sex marriage. In principle, from the point of view of whether a law is legitimate, their respective claims are on par with each other. And if that is correct, then whatever weight the claims have is independent of the relevant punishment and accountability norms.

In that case, Dworkin's argument appears to license objectionably authoritarian impositions of coercive rules. Would you like people in your society to behave better by your lights? So long as you genuinely believe your values and ideals are correct, it appears legitimate from Dworkin's point of view to use legal rules to press others into the service of them, and, unless prudential considerations dictate otherwise, go ahead and do so. Or, do you feel illegitimately burdened by sectarian rules that promote someone else's values? You have your work cut out for you. For Dworkin "encourage[s] liberals who wish to argue against, for example, the criminalization of homosexual sex, to engage in the honest toil of arguing that the reason such conduct ought not be criminalized is that there is nothing immoral in it" (1999, p. 946). This effectively reverses the burden of justification so that it falls on those who would like not to be coerced into conformity with values that are alien to them. Or, if it does not actually reverse it, then it makes the justification requirement pretty lenient. The burden of justification people must meet before a coercive law is justified would amount to a requirement to invoke the immorality of something, a view they hold

sincerely and have arrived at in good faith. At that point their burden would be met and shifted to those who object to the law.

Perhaps Dworkin would be happy with this version of liberalism. Or, perhaps he would be happy with a version where there is no presumption either way. Rather, when it comes to the question of whether some conduct should be criminalized, we should simply look at the reasons for and against and act on (our beliefs about) the overall balance of reasons. However, given that the presumption in favor of liberty has been foundational to liberalism, I regard this as a noteworthy instance of bullet biting.[14] Another possibility is that Dworkin has in mind a view where, in addition to sincerely believing the conduct is wrong, proposed legal interference must also receive majority democratic support in order for the state to legitimately enforce the coercion.[15] On this view, voting citizens can permissibly vote for the laws that they believe promote or protect the values they believe best line up with moral truth. In fact, members of liberal democracies overwhelmingly agree that citizens have a right to vote according to their beliefs and values and, sometimes with the further provision that these citizens are adequately informed, most agree that they should do so. However, the idea that citizens have a right to vote according to their beliefs and values is different than the idea that a democratic majority provides either a necessary or sufficient justificatory condition for coercion. Perhaps it is permissible, and even compatible with justificatory liberalism, to cast a vote that is grounded in nonpublic reasons or for a policy that fails the relevant justificatory test.[16] Finally, Dworkin might also accept a stronger view that incorporates democratic authorization, according to which any coercive proposals that receive democratic authorization are,

[14] In fairness, though, Dworkin would not be the only one. See, for example, Bird 2014 and Quong 2014.

[15] Dworkin defends an enforcement thesis in terms of majority preferences in Dworkin 1990. But, again, in Dworkin 1999, he claims to be concerned with the critical, rather than positive, morality.

[16] Gaus argues for this in Gaus 2009b.

because of that authorization, legitimate law. However, this is also an uncomfortable fit with traditional liberal concerns, like those Mill had, about "the tyranny of the majority" ([1859] 2004, p. 3). In response to these concerns, liberal thinkers took great pains to carve out conceptual as well as political space for rights as jurisdictional claims that are insulated from ordinary democratic decision-making.

The recommended path for avoiding different species of authoritarianism is to position some further provision between beliefs in a moral value and the legitimacy of coercively imposing that value on others with the law. This provision is aimed at validating that value as a genuinely authoritative moral requirement, which, if successful, would make it legitimately enforceable in principle. Minimally, successfully validating it would require more than simply one's (or a majority's) belief, even sincere and reasonable belief, that the moral value is correct, best justified or true.

Mill, in fact, says as much in the very passage where he presents his insight about the idea of wrongness that Dworkin likes so much:

> There are other things…which we wish that people should do, which we like or admire them for doing, perhaps dislike or despise them for not doing, but yet admit that they are not bound to do; it is not a case of moral obligation; we do not blame them, that is, we do not think that they are proper objects of punishment…. I think there is no doubt that this distinction lies at the bottom of the notions of right and wrong; that we call any conduct wrong, or employ, instead, some other term of dislike or disparagement, according as we think that the person ought, or ought not, to be punished for it; and we say, it would be right, to do so and so, or merely that it would be desirable or laudable, according as we would wish to see the person whom it concerns, compelled, or only persuaded and exhorted, to act in that manner (Mill [1861] 1979, p. 48).

What is the nature of the admiration Mill here says we have for others who do certain things? His point is that these are not things for which they would be liable to blame or punishment if they failed to do them, and so they are not moral obligations. Is it a kind of aesthetic admiration? Maybe, but many competent users of the term could probably understand it as a kind of moral admiration

for doing these things, while still disclaiming a moral obligation to do them. We can retain Mill's conceptual link between morality and punishability by invoking P.F. Strawson's distinction between "the realm of the ethical," a set of individual ideals or aspirational goals, and "the realm of the moral," a genuine social morality complete with norms of blame and punishment (Strawson 1961). Understood in these terms, Mill says that I can dislike the fact that not everyone lives up to these ideals of mine and that I can attempt to persuade and exhort people to take them up, but I do not appropriately blame them or view them as fitting objects of punishment if they reject my personal ethics and choose to pursue other ideals. I can only appropriately blame or interfere with them if their actions contravene morality, a system of social or interpersonal constraint. This morality includes rules and principles that we legitimately apply to each other as requirements to do or refrain from doing certain things. We hold each other socially accountable to these moral rules, sometimes by means of the criminal law. It is a public, rather than private, matter. And it is an interpersonal morality, issuing from what Darwall calls the second-person standpoint, rather than one's own first-person standpoint (2006b, p. 3).

This distinction between the realm of the ethical and the realm of the moral affects the validity of Dworkin's positive argument for legal moralism. It implies that not just any value or prescription will have the requisite sort of authoritative normativity or 'oomph' to straight away deliver his conclusion in 2. A prescription will fail to ground the Millian punishment norms if, for example, it derives from someone's personal ethics that, from your point of view, are wrong-headed or wicked or otherwise in deep conflict with your own. Only prescriptions that receive some further validation that they are in the realm of the moral are suitable for deriving the conclusion in 2. People may be able to use their own personal ethics to 'defeat' the imposition of a coercive rule, but not to impose one on others, unless the value also receives validation from the social or public moral perspective.

If this is correct, if it is legitimate to enforce values and prescriptions from the realm of public morality, but not legitimate to enforce those from the realm of private ethics, then the only remaining question concerns the nature of the test for regarding a value as distinctively moral. Whatever this test looks like, though, it will function as a principle that distinguishes conduct that some merely believe is immoral, and so punishable, from conduct that is genuinely so. The traditional liberal antipathy towards legal moralism derives from a more fundamental judgment about the illegitimacy of coercively enforcing alien, sectarian values. People have a general tendency to see their ethical commitments as genuine moral obligations and so they will regard them as enforceable, at least in principle. When they do this, they run together Mill and Strawson's distinction between ideals and obligations, but that makes it too easy to deflate the traditional liberal distinction between mere immorality and liability for coercive punishment. We can now more precisely identify the former as conduct judged immoral from the point of view of an individual's private ethical values, but without public validation and so not legitimately enforced. The latter is conduct validated from the perspective of the public and interpersonal realm of social morality and, because it is, conduct legitimately enforced.

I have not made the argument that the right test validating the values for inclusion in the realm of the moral is the liberal test of public justification from section II. But the features that distinguish the moral from the ethical suggest that a liberal "justifiable to" requirement of the sort defended by Rawls, Scanlon, Larmore or Gaus is a strong candidate for that test. Genuinely normative moral rules have to be authoritative. According to the liberal test, they are only if they are publicly justified, i.e., justified from the perspectives of those to whom they putatively apply. Genuinely normative moral rules actually do so apply in the sense that they provide every member of the public with significantly weighty reasons for acting. According to the liberal test, they are genuinely normative only if the rules make sense, or are (something like) reasonably endorsable,

from their point of view. And, rules that are simply expressions of one's personal values or ideals, or are such that they are capable of being grounded only in such values, fail to support social punishment norms. Moral condemnation and punishing only make sense in cases where the targeted people knew better than to act as they did in light of their reasons to acknowledge the authority of the social rules they violated. Otherwise, social rules amount to authoritarian impositions that obligate people only in the sense that others in society might forcibly *obligate* them to conform to these rules. Such values are sectarian in the sense described in section II and fail the liberal test of public justification, even if you think they have a lot to recommend them. Furthermore, as Gaus writes, "to respect others as free and equal moral persons is to refrain from claiming moral authority over them to demand that they do what they do not themselves have reason to endorse" (2011, p. 19). That test, then, or at least one a lot like it, is necessary to avoid disrespecting others by impugning their deliberative capacities.

Therefore, I leave Dworkin and other legal moralists with a dilemma. Is legal moralism permissible with respect to the realm of the ethical or only the realm of the distinctively moral? If it is permissible with respect to the former, then they maintain a kind of authoritarianism that fails to be supported by norms about accountability and the permissibility of coercion and punishment. The moral values, which could in principle ground various legal restrictions, are simply another person's beliefs and commitments and might play no role in the reasons for action of others who are forced to live according to them. If legal moralism is permissible with respect to only the realm of the moral and is supported by those accountability norms, then, contra Dworkin, there is a principled test – perhaps the liberal test of public justification or something very much like it – that distinguishes between values that are permissibly enforced in the law and values, even important ones, that are not.

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